

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

In re:

F.W. MYERS & CO., INC.,

Case No. 99-13641

Debtor.

APPEARANCES:

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Hon. Robert E. Littlefield, Jr., U.S. Bankruptcy Judge

MEMORANDUM-DECISION AND ORDER

The current matter before the court is the October 26, 2004 omnibus claims objection filed by Paul A. Levine, Esq., the Chapter 7 Trustee (“Trustee”). (Dkt. No. 246.) Many of the objections were either unopposed or resolved, but the claims of Karen O’Brian, Sandra Klein (nee Hammerman) (hereafter Sandra Klein), David McKey, Betsy Yacob, Philipp C. Aldridge, Gary Twite, and Traci Ann Spinney (collectively, the “Claimants”) were submitted to the court for a written decision.¹ All of the Claimants have filed opposition to the Trustee’s motion.

JURISDICTION

The court has jurisdiction over the parties and subject matter of this dispute pursuant to 28 U.S.C. §§157(a), (b)(1), (b)(2)(B), and 1334.

FACTS

- 1) F.W. Myers & Co., Inc. (“Debtor”) filed a Chapter 7 petition on June 16, 1999.
- 2) The Claimants were all employees of the Debtor.

¹ The Trustee’s objection to the claim of David McKey, Claim No. 437, has since been settled by Consent Order dated February 28, 2005. (Dkt. No. 275.)

- 3) The Debtor ceased business operations on or about June 16, 1999.
- 4) The last day to timely file a nongovernmental proof of claim was November 26, 1999.
- 5) The Claimants have filed the following claims:

a) Karen O'Brian timely filed a proof of claim requesting payment and priority status for wages and vacation pay totaling \$8,430.09. Her claim, Claim No. 333, was originally comprised of wages in the amount of \$1,330.09, severance pay in the amount of \$5,000, and vacation pay in the amount of \$2,100. She has, however, amended her priority wage amount from \$1,330.09 to \$1,302.99. (*See Dec. 17, 2004 Aff. of Karen L. O'Brian* ¶ 1, Dkt. No. 267.)² She has also amended her priority vacation amount from \$2,100 to \$607.68 (40 hours x \$15.192/hour), and reclassified the remaining balance of \$1,519.20 as general unsecured. (*Id.* ¶ 2.) Because the wages represent her gross pay from June 1, 1999 to June 15, 1999, she believes that portion of her claim is entitled to priority status.

b) Sandra Klein filed Claim No. 477 on January 18, 2000, requesting vacation pay of \$1,346.16 (80 hours x \$16.827/hour) and expense reimbursement of \$370.³ Although she has indicated she is entitled to priority status, she has not specified the amount.

c) Betsy Ann Yacob filed Claim No. 485 on April 17, 2000, requesting \$2,295 vacation pay, \$1,147.50 severance pay, and \$92.16 medical reimbursement, for a total claim amount of \$3,535.66. However, in November 2004, Ms. Yacob amended her priority vacation amount to \$1,223.91 and classified the balance as general unsecured. (*See Feb. 13, 2005 Letter of Betsy Ann Yacob* ("Feb. 2005 Yacob Letter"), Dkt. No. 274.)

d) Philipp C. Aldridge filed Claim No. 491 on October 6, 2000, requesting \$1,673.81 for unreimbursed employee expenses and \$4,154.00 vacation pay, for a total claim amount of \$5,827.81. He asserted priority status only for the vacation portion of the claim. However, he later increased the priority claim request to \$5,534.66. (*See Nov. 15, 2004 Letter of Phillip C. Aldridge*, Dkt. No. 257.)

e) Gary Twite filed Claim No. 493 on October 2, 2000, requesting \$2,999.64 for fifteen days

² The court notes that in a prior submission, Ms. O'Brian listed her wages due as \$1,302.99, \$1,316.54, and, finally, \$1,302. (*See Nov. 23, 2004 Aff. of Karen L. O'Brian* ¶ 1, Dkt. No. 254.) The wage portion of her claim is even more murky due to a copy of her actual wage statement from ADP payroll service, which is attached to her claim, showing a gross wage of \$1,336.90 for the pay period ending June 15, 1999.

³ In a response to the Trustee's objection filed November 23, 2004, Ms. Klein states the expense reimbursement is \$340.00. (*See Nov. 22, 2004 Letter of Sandra Klein*, Dkt. No. 253.) However, the total claim minus the vacation portion is \$370.00. The court assumes the \$340.00 is a scrivener's error.

of vacation pay. The claim asserts priority status for its full amount.

f) Traci Spinney filed Claim No. 495 on October 6, 2000, requesting \$2,461.54; \$1,961.54 as a priority for vacation pay and \$500 as general unsecured for unpaid medical expenses.

6) The Trustee filed a motion returnable December 2, 2004 objecting to the Claimants requests for the following reasons:

Claim No.	Claimant	Amount	Basis for Objection ⁴
29 & 333	Karen O'Brian		as a duplicate claim. Claim No. 333 should be reclassified as a general unsecured claim to the extent that it seeks vacation pay of \$2,100.00 from an unspecified period. Additionally, Claim No. 333 should be reclassified to general unsecured status to the extent that it exceeds the \$4,300.00 allowed under § 507(a)(3) as of the date the bankruptcy petition was filed. To the extent that the claim qualifies for priority under § 507(a)(3), the Trustee requests that the Court order this creditor to provide information regarding whether the amount claimed represents the gross of net wages of the claimant and, that, if the creditor fail[s] to provide such information, the claim be disallowed.
		\$1,716.16	
477	Sandra Klein		This claim should be disallowed because it was not signed by the creditor and was filed after the time allowed. Alternatively, the claim should be reclassified to a general unsecured claim to the extent that it seeks vacation pay of \$1,346.16. To the extent that the claim qualifies for priority under § 507(a)(3), the Trustee requests that the court order this creditor to provide information regarding whether the amount claimed represents the gross or net wages of the claimant and, that, if the creditor fail[s] to provide such information, the claim be disallowed.
		\$3,534.66	
485	Betsy Ann Yacob		This claim should be disallowed because it was filed after the time allowed. Alternatively, the claim should be reclassified as a general unsecured claim to the extent that it seeks vacation pay of \$2,295.00 for an unspecified period and severance pay of \$1,147.50. To the extent that the claim qualified for priority under § 507(a)(3), the Trustee requests that the Court order this creditor to provide information regarding whether the amount claimed represents the gross or net wages of the claimant and, that, if the creditor fail[s] to provide such information, the claim be disallowed.
		\$5,827.81	
491	Phillip C. Aldridge		This claim should be disallowed because it was filed after the time allowed. Alternatively, the claim should be reclassified to a general unsecured claim to the extent that it seeks vacation pay of \$4,154.00 for an unspecified period. To the extent that the claim qualified for priority under § 507(a)(3), the Trustee requests that the Court order this creditor to provide information regarding whether the amount claimed represents the gross or net wages of the claimant and, that, if the creditor fail[s] to provide such information, the claim be disallowed.
		\$2,999.64	
493	Gary Twite		This claim should be disallowed because it was filed after the time allowed. Alternatively, the claim should be reclassified to a general unsecured claim to the extent that it seeks vacation pay of \$2,999.64 for an unspecified period. To the extent that the claim qualified for priority under § 507(a)(3), the Trustee requests that the Court order this creditor to provide information regarding whether the amount claimed represents the gross or net wages of the claimant and, that, if the creditor fail[s] to provide such information, the claim be disallowed.
		\$8,430.09	
		Claim No. 29 should be disallowed	

⁴ The “basis for objection” is taken verbatim from the Trustee’s motion.

Traci Spinney

\$2,461.54

claim be disallowed.

This claim should be disallowed because it was filed after the time allowed. Alternatively, the claim should be reclassified to a general unsecured claim because it seeks reimbursement for vacation pay for an unspecified period and fails to claim a priority for the remaining amount of the claim.

7) In his “First Reply to Opposition to Trustee’s Objection to Claims” dated November 30, 2004 (the “Trustee’s First Reply”) (Dkt. No. 262), the Trustee withdrew that portion of his objection based upon the untimely filing of the Aldridge, Twite, and Spinney claims.

ARGUMENTS

The Trustee argues that, absent a verified statement from the Claimants, the vacation portions of all the claims should be reclassified from priority to general unsecured status because 11 U.S.C. § 507(a)(3)⁵ requires that vacation pay be earned within 90 days of the filing date to garner priority status. (*See Trustee’s Feb. 2, 2005 Letter Br. (“Trustee’s Letter Brief”)* at unnumbered p. 1, Dkt. No. 273) (emphasis added.) The Trustee further contends that the full amount of the vacation pay earned by an employee during the course of his or her employment is not entitled to priority simply because it becomes payable upon termination within the 90 days prior to filing. (*Id.*) Based on the available documentation, the Trustee states that it is unclear what portion of each vacation claim, if any, is entitled to priority status.

The Trustee further objects to the severance portions of the claims of Claimants O’Brian and Yacob on grounds that Ms. O’Brian’s severance contingency was never met and Ms. Yacob gives no basis whatsoever for a severance claim.

⁵ 11 U.S.C. § 507 is entitled “Priority” and, as of the date of filing, states in relevant part:
(a) The following expenses and claims have priority in the following order:

. . . .
(3) Third, allowed unsecured claims, but only to the extent of \$4,300 for each individual . . . earned within 90 days before the date of the filing of the petition or the date of the cessation of the debtor’s business, whichever occurs first, for—

(A) wages, salaries, or commissions, including vacation, severance, and sick leave pay earned by an individual

11 U.S.C. § 507(a)(3)(A).

The only Claimant to respond to the Trustee's Letter Brief was Ms. Yacob, who reduced her request for vacation pay to \$1,223.91 stating that she received four weeks of vacation per annum or a total of 20 days. (*See Feb. 2005 Yacob Letter.*) Thus, for the 90 day period prior to filing, she would have earned one week or five days of vacation. As regards severance pay, Ms. Yacob submitted a copy of a portion of her F.W. Myers employee handbook which states, "If termination is strictly for lack of funds, you will be provided two weeks notice or payment of your regular salary in lieu of notice." (*See Attach. to Feb. 2005 Yacob Letter.*) Since she received three hours notice, she argues she is entitled to two weeks of severance pay. She further argues she is entitled to either reimbursement of money deducted from her paycheck that was never remitted to her insurance provider for medical insurance premiums or reimbursement of medical bills that she had to pay as a result of her lost coverage.

DISCUSSION

I) Burden of Proof

"A claim or interest, proof of which is filed under section 501 of [Title 11], is deemed allowed, unless a party in interest . . . objects." 11 U.S.C. § 502(a). Under Federal Rule of Bankruptcy Procedure 3001(f), a properly executed and filed proof of claim is *prima facie* evidence of the validity and amount of the claim. Thus, where an objection has been filed, it is the objecting party that bears the burden of presenting evidence to overcome the presumed validity and amount of the claim. The burden returns to the claimant only if the objecting party can produce sufficient evidence to overcome the *prima facie* effect given to the claim. *In re Deschamps*, Case No. 98-12097, slip. op. (Bankr. N.D.N.Y. July 26, 2004). Here, the Trustee has raised sufficient questions so as to shift the burden to the Claimants to justify their claims.

II) Timeliness of Filing Proof of Claim

11 U.S.C. §§502(b)(9)⁶ and 726(a)(1), (2), and (3)⁷ address tardily filed claims. In the instant case, once bifurcated, we have both priority and general unsecured claims, some that are timely and

⁶ 11 U.S.C. § 502 is entitled “Allowance of Claims or Interests” and states in relevant part:

(b) . . . if [an] objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition, and shall allow such claim in such amount, except to the extent that—

. . . .

(9) proof of such claim is not timely filed, except to the extent tardily filed as permitted under paragraph (1), (2), or (3) of section 726(a) of this title

11 U.S.C. § 502(b)(9).

⁷ 11 U.S.C. § 726 is entitled “Distribution of Property of the Estate” and states in relevant part:

(a) . . . property of the estate shall be distributed—

(1) first, in payment of claims of the kind specified in, and in the order specified in, section 507 of this title, proof of which is timely filed under section 501 of this title or tardily filed before the date on which the trustee commences distribution under this section;

(2) second, in payment of any allowed unsecured claim, other than a claim of a kind specified in paragraph (1), (3), or (4) of this subsection, proof of which is—

(A) timely filed under section 501(a) of this title; or

. . . .

(C) tardily filed under section 501(a) of this title, if—

(I) the creditor that holds such claim did not have notice or actual knowledge of the case in time for timely filing of a proof of such claim under section 501(a) of this title; and

(ii) proof of such claim is filed in time to permit payment of such claim;

(3) third, in payment of any allowed unsecured claim proof of which is tardily filed under section 501(a) of this title, other than a claim of the kind specified in paragraph (2)(C) of this subsection

11 U.S.C. § 726.

some that are late. All claims at issue were submitted before the date the Trustee commenced distribution. As such, all priority claims will be allowed pursuant to § 726(a)(1). General unsecured claims will be allowed either pursuant to § 726(a)(2)(C) or (a)(3) depending on whether the creditor had notice or actual knowledge of the case.⁸

In the Trustee's First Reply, he has withdrawn his tardiness objection to the claims of Aldridge, Twite, and Spinney based on their lack of knowledge of the bankruptcy filing. Similarly, Ms. Yacob has stated that she did not receive notification of the filing. (*See Nov. 18, 2004 Letter of Betsy Ann Yacob*, Dkt. No. 252.) However, unlike the Aldridge, Twite, and Spinney claims, the Trustee has not specifically withdrawn his lateness objection. The court will assume this is an oversight of the Trustee and that the Trustee desires to treat the timing of the filing of the Yacob claim in a manner similar to the Aldridge, Twite, and Spinney claims.⁹ Thus, the court will treat the Trustee's timeliness objection to the Yacob claim as withdrawn.

The other timeliness objection is against the Klein claim. Ms. Klein states in a letter to the court that she relocated after the Debtor ceased operating and that her "contact information changed." (*See Nov. 22, 2004 Letter of Sandra Klein ("Nov. 2004 Klein Letter")*, Dkt. No. 253.) The Trustee is correct that this minimal information in letter form is simply insufficient to answer the lateness problem. Ms. Klein has certainly had sufficient time to adequately respond to the Trustee's information request and, having failed to do so, her unsecured claim is subordinated to a § 726(a)(3) level.

⁸ *See supra* n.7.

⁹ The court notes that each of the four Claimants listed above submitted responses in letter format rather than in sworn affidavits.

III) The Status of the Claims

The primary issue in this matter concerns whether the claims rise to the level of priority status.

A) Karen O'Brian

Ms. O'Brian's amended claim requests \$8,429.87. The Trustee is correct that the condition precedent to the fruition of the \$5,000.00 severance payment never occurred; that portion of the claim is thus disallowed.¹⁰ However, the amended gross wage amount of \$1,302.99¹¹ qualifies for priority status, as it represents the final pay period on the eve of filing for which the Claimant received a dishonored paycheck. Similarly, Ms. O'Brian is entitled to vacation pay in the lesser gross amount of \$599.48. Ms. O'Brian states she accrued one week of vacation in the 90 days prior to the filing. It is unclear how vacation time accrued. The court will assume that Ms. O'Brian accrued four weeks of vacation per year rather than one week each quarter. Thus, she would be entitled to 20 days per annum or 160 hours. The per diem would be $160 \text{ hours} \div 365 \text{ days} = .4384$ hours. Over the 90 day period prior to filing, she would have been entitled to 39.45 hours. At \$15.192 per hour, the gross priority amount would be \$599.48. Her total gross priority claim would thus be allowed in the amount of \$1,902.47, with the balance of \$1,527.40 being classified as a general unsecured claim. Additionally, there was no opposition by the Claimant to the Trustee's

¹⁰ A June 1999 letter from Roy David, Consultant for F.W. Myers, to Jane Frangos, Senior Vice President of BNY Financial Corp., states that the severance payments were contingent upon the Bank of New York being paid in full by the Debtor. (*See June 10, 1999 Letter of Roy David, Ex. to Nov. 23, 2004 Aff. Of Karen O' Brian*, Dkt. No. 254.) There is no indication what, if any, portion of the approximately \$1,400,000 obligation to the Bank of New York was satisfied.

¹¹ Although it would appear Ms. O'Brian is entitled to \$1,336.90, the court will allow her reduced request and deem the difference waived. *See supra* note 2.

request to expunge the duplicate claim; therefore, the Trustee's motion to disallow Claim No. 29 in its entirety is granted.

B) Sandra Klein

Ms. Klein states, "I was entitled to 10 vacations [sic] days during 1999." (*See Nov. 2004 Klein Letter.*)¹² Thus, on an annual basis she would have been entitled to 10 days or 80 hours x \$16.827/hour or \$1,346.16. This would translate to a per diem of \$3.688 or \$331.93 for the 90 day period prior to filing. As such, that gross amount qualifies for priority status. The Trustee has not objected to the amount of the general unsecured portion; that is allowed in the amount of \$1,014.23. Similarly, as the Trustee has not objected to the amount of the expense reimbursement portion of the claim, it is allowed on a priority basis in the amount of \$370.00. Thus, Ms. Klein is allowed a total gross priority claim of \$701.93 and a subordinated, general unsecured claim of \$1,014.23. *See* discussion regarding the timeliness of filing *supra* pp. 7–8.

C) Betsy Ann Yacob

Ms. Yacob filed an amended priority claim requesting \$2,463.57. The Trustee has not objected to the amount of \$92.16 as a priority medical reimbursement and, thus, it is allowed. Ms. Yacob also states she was entitled to 20 days vacation per year which equates to 160 hours. At \$15.30 per hour, her gross vacation compensation would have been \$2,448 or a per diem of \$6.708 per day. For the 90 days prior to filing, her priority gross vacation compensation is \$603.72 and her

¹² Although Ms. Klein did not submit any company policy regarding vacation accrual, Betsy Ann Yacob did. (*See* Dkt. No. 274.) According to Ms. Yacob's exhibit, the minimum vacation period for any full time employee was ten days. After five years of service the vacation benefit increased to 15 days and after 12 years of service to 20 days. After 20 years, the paid vacation increased to a minimum of 25 days. The court thus assumes Ms. Klein was an employee for less than 5 years.

claim is allowed in that amount. Additionally, Ms. Yacob requests severance pay in the amount of \$1,147.50 because she was not provided with 2 weeks advance notice of her employment termination. Despite the statement from her employee handbook, there is nothing to indicate whether the business closed due to lack of work, lack of financing, mismanagement, or other problems. As such, the severance pay portion of the claim is disallowed. Ms. Yacob is allowed a total priority claim of \$695.88, and a general unsecured claim of \$1,691.28.¹³

D) Philipp C. Aldridge

By letter filed November 24, 2004, Mr. Aldridge amended his priority claim from \$5,827.81 to \$5,534.66, representing unused vacation compensation and unreimbursed employee expenses.¹⁴ The Trustee has not specifically objected to the expense portion of the amended claim and thus that segment of Mr. Aldridge's claim is allowed. However, virtually no information is provided about the vacation portion of the claim. The Claimant has listed 27 vacation days on the face of his claim, but he has not provided his last rate of pay or how much vacation time accrued in the 90 days prior to filing. Because the burden shifted to Mr. Aldridge and he failed to supply the Trustee with the documentation requested, the vacation claim is reclassified to general unsecured status. He is, therefore, allowed a priority claim in the amount of \$1,673.92, and a general unsecured claim of

¹³ Ms. Yacob also claimed a priority found in § 507(a)(4) which relates to employee benefit plan contributions. However, no basis, reasoning, or explanation is offered by the Claimant regarding this subsection and, as such, her request for priority status on such grounds is denied.

¹⁴ Mr. Aldridge's original claim filed October 6, 2000 was for a total of \$5,827.81, representing vacation pay of \$4,154.00 and expense reimbursement of \$1,673.81, but the actual employee expense receipts total \$1,673.92. The court will assume a scrivener's error for the .11 difference. However, the November 24, 2004 amendment asserts a priority claim of \$5,534.66. There is no explanation for the approximately \$300 differential from the original claim.

\$3,860.74.

E) Gary Twite

Mr. Twite requests \$2,999.64 on a priority basis representing unused vacation time. However, this claim suffers the same infirmity as Mr. Aldridge's vacation claim, a lack of information regarding rate of pay and time accrued in the 90 days prior to the bankruptcy filing. Accordingly, Mr. Twite's vacation claim of \$2,999.64 is reclassified to general unsecured status.

F) Traci A. Spinney

Ms. Spinney's original claim requested priority status for only \$1,961.54 of the total amount of \$2,461.54. On November 23, 2004, however, Ms. Spinney amended her claim to reclassify the entire amount as a priority claim for unused vacation pay and an unpaid medical expense. As with Mr. Aldridge and Mr. Twite, Ms. Spinney provides no supporting information for either component of her claim. She has not provided any detail on the medical bill and has not submitted an affidavit regarding her last rate of pay or vacation time accrued in the 90 days prior to the bankruptcy filing. Her claim of \$2,461.54, therefore, is also reclassified in its entirety to general unsecured status.

CONCLUSION

The court has allowed the Claimants sufficient time to resolve the Trustee's objections and, although reclassification of their claims, either in whole or in part, is a last resort, the court issues this decision in the interest of finality. The Trustee's objection has been pending since November 2004, and the Claimants have been given sufficient time to provide the Trustee with evidence supporting their claims; the Trustee received no response to either his First Reply or his Letter Brief from many of the Claimants. Under the circumstances, the court concludes that reclassification as specified herein is warranted and necessary to achieve distribution and closure in this case.

It is so ORDERED.

Dated: August 23, 2005
Albany, New York

/s/Robert E. Littlefield, Jr.
Hon. Robert E. Littlefield, Jr.
U.S. Bankruptcy Judge